



Date: September 30, 1998

Case No. 97-INA-557

In the Matter of:

A & G DEVELOPMENT INC.,
Employer,

on behalf of:

FRANCISCO E. PADILLA
Alien.

Appearance: Mary LaJeunesse

Before: Huddleston, Lawson and Neusner
Administrative Law Judges

JAMES W. LAWSON
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application filed on behalf of the alien by the employer under §212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A) (the Act) and the regulations promulgated thereunder, 20 CFR Part 656.¹ After the Certifying Officer (CO) of the U.S. Department of Labor (DOL) issued a Final Determination (FD) denying the application, the Employer requested review pursuant to 20 CFR § 656.26.²

Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are

¹The following decision is based on the record upon which the CO denied certification, including the Notice of Findings (NOF), rebuttal and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

²Administrative notice is taken of the Dictionary of Occupational Titles, (DOT) published by the Employment and Training Administration of the U. S. Department of Labor.

not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U. S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

THE PROCEEDINGS

Employer seeks to fill the position of Office Manager with DOT Title Manager, Office, DOT #169.167-034, a wage offer of \$14.00 per hour, job duties of:

Co-ordinate all office Transactions, Business Contracts, Negotiate and put together contracts in both English and Spanish. Translate.

and job requirements of an undergraduate degree and two years of experience in the job offered.

Other special requirements included:

Fluent in English and Spanish. Familiar with American and Mexican Laws.
Public Relations. (AF 144)

After issuing several NOFs, labor certification was finally denied by the CO on the basis that the employer failed to provide the necessary documentation and justification for the combination of duties which required the applicant to function as an Office Manager and Real Estate Lawyer or Paralegal. (AF 13)

CONTENTIONS ON APPEAL

On appeal, employer seeks review of the contentions, among others, that the organization is a small but rapidly growing business and that the employees are required to assume additional duties outside of their primary function. (AF 2) Because the job is a newly created position, employer argues that there is no prior employment record to document the need for all of the job requirements. (AF 2)

DISCUSSION

This case reflects considerable controversy in that it: (1) involved extended correspondence between the employer, the CO and the state agency, Texas Employment Commission (TEC); (2) included a remand from the CO to TEC questioning, among other things,

\$ASQIn-Re-A--&--G--DEVELOPMENT,1997-INA-00557--(Sep--30,--1998),--CADEC,--1257
32,--wp.wpd

the job title, coding and duties as Manager, Office (AF 110-111) in the TEC transmittal indicating a prevailing wage of \$9.71 per hour (AF 113) and TEC's response adhering to its coding (AF 109); and (3) had at least 4 NOFs (AF 102-106, 89-94, 48-52 and 33-38) and some 6 rebuttals (AF 97-98, 53-88, 39-43, 25-28, 16-17 and 8-10) as well as various collateral statements by the alien. Review of the record makes it apparent that the CO went to extraordinary lengths to allow the employer every opportunity to qualify the alien. Notwithstanding, employer has failed to justify the combination of duties implicit in the job description, the rebuttal, and the appellate review statements, as well as the job as advertised in the Advertising Age:

NEED Office Manager

\$14/hr. To coordinate all ofc transactions, nego. & put together contracts in both Eng. & Span. Translate, College, bachelor's, legal studies. 2 yrs. Exp. Fluent in Eng. & Span., familiar w/ Amer. & Mex. laws. Public Relations. ***"Apply at the Texas Employment Commission, El Paso, Texas or send resume to The Texas Employment Commission, T.E.C. Building, Austin, Texas 78778. J.O. #7214556."*** "Ad Paid by An Equal Opportunity Employer." (AF 134)

Denial was predicated upon the finding in the FD:

656.21(b)(2)(ii) If the job opportunity involves a combination of duties, for example engineer-pilot, the employer must document that it has normally employed persons for that combination of duties and/or workers customarily perform the combination of duties in the area of intended employment, and/or the combination job opportunity is based on a business necessity. (AF 13)

Our office issued several Notices of Findings requiring the employer to provide justification for the apparent combination of duties of an Office Manager and a Real Estate Lawyer or a Paralegal. Each response from the employer provided additional information; however, never provided justification for the combination of duties.

The employer's rebuttals emphasized that while the candidate would be responsible for managing the office in its entirety, the candidate would just as importantly be the "Chief Legal Liaison" and must have a Bachelor's degree in Legal Studies, be skilled in all area of Real Estate laws and contracts, and be fluent in Mexican and American laws, especially dealing with immigration. The employer never provided justification for the combination of duties.

Consequently, since the employer failed to provide documentation to justify the combination of duties, this application is denied. (AF 13)

In response to this finding, the request for review states:

The position to be filled is a newly created one. I have no prior employment record for it. I have however included a reference letter from Mary Coca who is in the same line of business, that confirms the need for all my requirements. She has also managed all family Real Estate Transactions, from Leasing to purchasing/selling. (AF 2)

The request for review does not dispute that “the employer failed to provide documentation to justify the combination of duties” of Office Manager³ and a Real Estate Lawyer⁴ or a Paralegal⁵. However, the request for review further states:

³169.167-034 MANAGER, OFFICE (any industry) alternate titles: chief clerk; manager, administrative services

Coordinates activities of clerical personnel in establishment or organization: Analyses and organizes office operations and procedures, such as typing, bookkeeping, preparation of payrolls, flow of correspondence, filing, requisition of supplies, and other clerical services. Evaluates office production, revises procedures, or devises new forms to improve efficiency of workflow. Establishes uniform correspondence procedures and style practices. Formulates procedures for systematic retention, protection, retrieval, transfer, and disposal of records. Plans office layouts and initiates cost reduction programs. Reviews clerical and personnel records to ensure completeness, accuracy, and timeliness. Prepares activities reports for guidance of management, using computer. Prepares employee ratings and conducts employee benefit and insurance programs, using computer. Coordinates activities of various clerical departments or workers within department. May prepare organizational budget and monthly financial reports. May hire, train, and supervise clerical staff. May compile, store, and retrieve managerial data, using computer.

GOE: 07.01.02 STRENGTH: S GED: R4 M3 L4 SVP: 7 DLU: 88

⁴110.117-034 LAWYER, REAL ESTATE (profess. & kin.)

Specializes in sale and transfer of real property: Institutes title search to establish ownership. Draws up documents, such as deeds, mortgages, and leases. May act as trustee of property and hold funds for investment or issuance. May act as agent in real estate transactions.

GOE: 11.04.02 STRENGTH: S GED: R6 M4 L6 SVP: 8 DLU: 77

⁵119.267-026 PARALEGAL (profess. & kin.) alternate titles: law clerk; legal aid; legal assistant

Researches law, investigates facts, and prepares documents to assist LAWYER (profess. & kin.)
110.107-010: Researches and analyzes law sources such as statutes, recorded judicial decisions, legal articles, treaties, constitutions, and legal codes to prepare legal documents, such as briefs, pleadings, appeals, wills, contracts, initial and amended articles of incorporation, stock certificates and other securities, buy-sell agreements, closing papers and binders, deeds, and trust instruments for review, approval, and use by attorney. Appraises and inventories real and personal property for estate planning. Investigates facts and law of case to determine causes of action and to prepare case accordingly. Files

We have tried since 1994 to fill this position and have not been successful in doing so. We have included all the information from the prior rebuttals plus the documents from two businesses (Mary Coca & Style Masters Casting Company) that document the business necessity of my Job Requirements. (AF 3)

The request for review contains no further explanation of these documents. The Style Masters Casting Company document, purports to solicit "Club Member" to order car and bike plaques from the owner, Cesar LaJeunesse.⁶ Search of the record indicates that such document had previously been submitted (AF 29-30) 27) with an accompanying hand written note by a customer canceling an order (AF 31) in the March 13, 1995 rebuttal with the explanation:

We have also included documents from another similar business that show where a manager has the same combination of duties and responsibilities as my business requires. Style Master Casting's office manager has responded to a legal matter where one of the clients, "the president of a club" wanted to cancel an order after the items had already [sic] been manufactured. This is a legal issue being handled by the Officer Manager. (AF 27)

This strained argument is so far-fetched as to be off the radar screen of relevance. At best, it argues that every business should have a staff attorney at office manager wages to deal with everyday business transactions. The additional October 16, 1996 letter from Rozlyn LaJeunesse threatening to contact an attorney if an invoice is not paid (AF 7) was apparently not previously submitted and hence may not be considered, *Memorial Granite*, 94-INA-66 (Dec 23, 1994) and *Capriccio's Restaurant*, 98-INA-480 (Jan. 7, 1992), *Modular Container Systems, Inc.*, 89-INA-228 (July 16, 1991) (en banc); *Yaron Development Co.*, 89-INA-178 (Apr. 19, 1991) (en banc). but is equally off the screen of relevance. Nor does the Mary Coma undated memorandum (AF 4) professing a need, as a self-employed broker and investor to take courses in real estate law and training in immigration, also apparently not previously submitted and hence not to be considered, add anything of substance. Vague and incomplete rebuttal documentation will not meet the employer's burden of establishing business necessity. *Analysts International Corporation*, 90-INA-387 (July 30, 1991).

pleadings with court clerk. Prepares affidavits of documents and maintains document file. Delivers or directs delivery of subpoenas to witnesses and parties to action. May direct and coordinate activities of law office employees. May prepare office accounts and tax returns. May specialize in litigation, probate, real estate, or corporation law. May prepare real estate closing statement and assist in closing process. May act as arbitrator and liaison between disputing parties. May act as law librarian, keeping and monitoring legal volumes and ensuring legal volumes are up-to-date. May search patent files to ascertain originality of patent application and be designated Patent Clerk (government ser.).

GOE: 11.04.02 STRENGTH: L GED: R5 M2 L5 SVP: 7 DLU: 87

⁶ Employer is represented by Mary LaJeunesse

The standards applicable in instances of combination of duties are set forth in *Robert L. Lippert Theatres*, 88-INA-433 (May 30, 1990) (*en banc*):

Section 656.21(b)(2)(ii) requires that if a job opportunity contains a combination of duties 1/, the employer must document that 1) it has normally employed persons for that combination of duties, and/or 2) that workers customarily perform the combination of duties in the area of intended employment, and/or 3) that the combination job opportunity is based upon business necessity. The first two prongs of this provision, the "normally employed" and "industry norm" tests, are fairly straightforward and easily applied. For example, the Board has previously held that, where a combination of duties is consistent with the description of the job in the Dictionary of Occupational Titles (DOT), the combination is normal and business necessity need not be shown. *Alan Bergman Photography*, 88-INA-404 (Sept. 28, 1989). Similarly, in *Van Boerum & Frank Associates*, 88-INA-156 (Dec. 5, 1989), a small engineering firm justified a combination of managerial and training duties by documenting that, although it had never used the combination, it was customarily used by firms in the area of intended employment. The third prong of the section, whether the combination is based upon business necessity, is more difficult to define and apply. As the C.O.'s brief states (at p.7), this prong need only be considered when neither of the first two prongs have been met.

Accordingly, for a combination of duties to be based on business necessity under section 656.21(b)(2)(ii), an employer must document that it is necessary to have one worker to perform the combination of duties, in the context of the employer's business, including a showing of such a level of impracticability as to make the employment of two workers infeasible. The intent of this formula is to focus the parties on addressing the fundamental issue of why it is necessary to have one worker perform the duties instead of two or more. Implicit in this standard is a showing by the employer that reasonable alternatives such as part-time workers the purchase of new equipment and a reordering of responsibilities within the organization are infeasible. 4/ In addition, though not necessary to satisfy the test, a showing that the duties are essential to perform each other would weigh heavily in favor of business necessity. [footnotes omitted]

As in *Lippert Theatres*, because the employer has not documented that it has normally

employed persons for the specified combination of duties, or that workers customarily perform the combination of duties in the area of intended employment, or that the combination of duties is based on a business necessity under section 656.21(b)(2)(ii), employer has not met the criteria of the regulation.

Accordingly, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

JAMES W. LAWSON
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW
Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may

\$ASQIn-Re-A--&--G--DEVELOPMENT,1997-~~8~~NA-00557--(Sep--30,--1998),--CADEC,--1257
32,--wp.wpd

order briefs.

\$ASQIn-Re-A--&--G--DEVELOPMENT,1997-INA-00557--(Sep--30,--1998),--CADEC,--1257
32,--wp.wpd